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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 855

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

against

FRANK CERESTE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

BRIEF FOR RESPONDENT IN OPPOSITION

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Questions Presented

The questions presented by the petitioner are non-existent:

1. No question is presented for review concerning respondent's unwritten and unsworn statement to petitioner's representatives, since the jury had the right to disregard the statement and believe respondent's trial testimony.

2. No question is presented for review concerning notice of the dangerous condition. Since the petitioner created the dangerous condition, no notice of its existence was necessary to prove respondent's case. But, even if it were necessary, notice was amply established by the proof.

3. No question is presented for review concerning the admissibility of testimony showing a habit of negligence since, in addition to the ground for its admisson advanced by Judge Frank, all three judges of the Court of Appeals agreed that ths very testimony is admissible on other valid grounds.

4. Proof of petitioner's custom of making up trains, containing coal cars, and of its procedures for cleaning up the yard, was properly received under Rule 43(a) of the Federal Rules of Civil Procedure because, in addition to the reasons given by Judge Waterman, New York courts hold such testimony to be admissible. No question as to its admissibility is therefore presented for review.

Statement of Case

Respondent brought this suit under the Federal Employers' Liability Act to recover damages for injuries sustained by him on April 11th, 1949, while working for petitioner in its railroad freight yard, operated and controlled by it. Judgment for respondent, entered upon a verdict of a jury, was unanimously affirmed by a Court of Appeals.

The proof shows that respondent was walking in the course of his work in the freight yard along a path that ran between two parallel sets of tracks (48);* that the path was strewn with pieces of coal (91, 92, 109, 146-147, 164, 165, 190-191); that plaintiff tripped over a piece of coal on the path (51-52), lost his balance and came in contact with a moving freight train on one of the tracks, and that, as a result, his leg was badly crushed and had to be amputated (53).

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* Numbers in parentheses refer to pages of the Appendix.

The proof further shows that loaded coal cars were continually being shuttled back and forth on the tracks in the yard and particularly the tracks on either side of the path; that, in the process of moving the cars about, they were made to bump against one another so that coal would fall on the paths between the cars (118-119); that the petitioner recognized the necessity for inspecting and clearing these pathways (12-13, 26-27); that there had been a lack of men assigned to clean the paths during the period in question because the men normally available to clean up work had been occupied with construction work in another yard (31-32); that only a few men were left in the yard where the accident occurred to take care of emergencies; and that clean-up operations did not constitute an emergency (32, 124-125).

ARGUMENT

There is no basis for the allowance of the writ.

(1)

The unanimous decision of the Court of Appeals affirming the right of the jury to disregard respondent's alleged pre-trial unsworn statement and to believe his trial testimony is not in conflict with any decision of another Court of Appeals nor with any applicable decision of this Court.

The so-called statement was made by respondent in an informal inquiry conducted by petitioner about ten days after respondent returned from the hospital. No attorney was present to represent him (94). The questions and answers were not shown to have been submitted to him or signed by him. Such informal statements made out of court do not have the force of a judicial admission and are neither final nor conclusive. They merely may affect the credibility of the witness, if claimed to be contradictory,

and may be considered by the jury only in passing upon credibility.

Wigmore on Evidence, 3d Ed. Sec. 1058.
Mathis v. *Tuttweiler*, 295 Fed. 661 (6th Cir., 1924).
Hilleary v. *Earle Restaurant*, 109 Fed. Supp. 829, (Dist. Ct., D. C., 1952).

The decisions cited by the petitioner are not in conflict with the decision of the Court of Appeals in the case at bar and are clearly distinguishable. They relate to what Professor Wigmore refers to as "judicial admissions", that is, sworn to or stipulated statements made in the course of a judicial proceeding, and not to informal pre-trial statements as is the one in this case.

(2)

The ruling of the Court of Appeals that no notice of the dangerous condition was required, because the petitioner created the dangerous condition, is in accord with the decisions of the Second Circuit Court of Appeals and of other Courts of Appeals. Since petitioner had sole control of the premises, the jury properly found that only its conduct could cause the dangerous condition.

Southern Ry. Co. v. *Puckett*, 244 U. S. 571, 37 S. Ct. 703.
Tash v. *St. Louis and San Francisco Ry. Co.*, 335 Mo. 1148, 76 S. W. 2d, 690.

Wherever the Court has held notice to be a requirement, it was either because the accident occurred on premises not controlled or maintained by the defendant or because the dangerous condition was caused by a third-party or force not under the defendant's control. In the case at

bar, proof was overwhelming that the danger was created by the carelessness and negligence of the defendant at a place solely maintained and controlled by it so that respondent's place of employment became unsafe by reason thereof.

Moreover, there is ample testimony that petitioner did have notice of the dangerous condition, as, for example: (a) respondent's testimony that a week before the accident he had seen a lot of coal in the vicinity of the occurrence (83-85); (b) the testimony of coal falling in the path from coal cars bumping against each other (120); (c) the testimony of complaints made by the Safety-First Committee to the petitioner that coal scattered in its yard constituted a menace to employees working there (27).

Finally, petitioner made no request to charge on the question of notice and did not except to the Court's omission to charge in that respect (217, 220, 228).

(3)

The petitioner presents for review Judge Frank's approval of the admission of certain testimony because it tended to show a habit of negligence. The petitioner conveniently overlooks the fact that this very same evidence is held admissible by all three judges on other concededly valid and proper grounds. The testimony sought to be reviewed concerns the transfer to other places of a substantial portion of men who were supposed to be available for clean-up operations, thus keeping them from doing such work in the yard during the period immediately prior to the injury. This testimony Judge Frank held admissible as showing a habit of negligence. All three judges of the Court of Appeals held its admission to be free of error on grounds additional to that urged by Judge Frank, to wit, (a) Judge Hincks held it admissible because such testimony was offered subject to connection

and petitioner's counsel had neither asked that it be connected nor made any motion to strike out; (b) Judge Waterman held that it was properly admissible because it tended to round out the picture presented by the evidence that complaints of litter, including coal, strewn over the yard had been made by a Safety Committee of petitioner and that no means or opportunity had existed for its removal; (c) Even Judge Frank held that "Aside, however, from the question whether this evidence was admissible as tending to show a habit of negligence, it was relevant to show that clean-up operations were not properly performed shortly before the accident."

Since there were these cogent reasons for the admission of the testimony, it is unnecessary to consider whether it was also admissible on the ground that it showed a habit of negligence, though it is submitted that this additional reason advanced by Judge Frank for admitting the testimony is supported by compelling logic. Incidentally, Judge Frank's discussion does not conflict with the cases cited by the petitioner, none of which are decisions under the Federal Employees' Liability Act and all of which deal with the admissibility of either an isolated act of negligence or of acts of negligence occurring on occasions wholly disassociated from the basic act of negligence charged.

(4)

As pointed out by Judge Waterman, Rule 43(a) of the Federal Rules of Procedure, 28 U. S. C. presents no obstacle to the admission of the testimony concerning the method petitioner employed in making up of trains containing coal cars, resulting, as that did, in coal falling onto the tracks and pathways from the coal cars. Nor does it interdict proving the procedure for cleaning up the debris in the yard and on the pathway in question. Such testimony was clearly relevant to show the probability of

the existence of the defective condition causing the accident and is admissible by the very language of 43 (a), which reads, in part, as follows:

> "All evidence shall be admitted which is admissible • • • under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held."

And which further provides:

> "In any case, the statute or rule which favors the reception of the evidence governs, and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

In addition to its admissibilty on the grounds stated in (3) hereof, the evidence here involved is admissible because it tends to prove a particular fact, namely, the defective condition of the pathway, as a result of a negligent practice, routine or custom of a corporation, as distinguished from evidence relating to habits of individuals.

This type of evidence has been held to be admissible by the New York state courts. (See Judge Waterman's opinion, pages 17a and 18a of Petition for Writ of Certiorari.) The evidence is, therefore, admissible under the language of Rule 43(a).

Consequently, the admission of this evidence does not conflict with any Federal decision or law, but is, on the contrary, in accord therewith. The cases cited by the petitioner are wholly inapplicable because they relate to habitual responses of individuals.

CONCLUSION

No substantial reasons having been presented to indicate the need for review, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JACOB D. FUCHSBERG,
Counsel for Respondent.